

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF ALABAMA
3 SOUTHERN DIVISION

4 IN RE: BLUE CROSS BLUE SHIELD CASE NO.: 2:13-cv-20000-RDP
5 ANTITRUST LITIGATION MDL 2406

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7 STATUS CONFERENCE

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9 BEFORE THE HONORABLE R. DAVID PROCTOR, UNITED STATES
10 DISTRICT JUDGE, at Birmingham, Alabama, on Thursday, June 20,
11 2019, commencing at 9:41 a.m.

12 APPEARANCES:

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8 Proceedings reported stenographically;
 9 transcript produced by computer.

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11 (The following proceedings were heard before the Honorable
 12 R. David Proctor, United States District Judge, at
 13 Birmingham, Alabama, on Thursday, June 20, 2019, commencing
 14 at 9:41 a.m.):

15 THE CLERK: Remain seated, please, and come to order.

16 THE COURT: All right. Good morning, everyone.

17 COUNSEL IN UNISON: Good morning, Your Honor.

18 THE COURT: Well, we have a chipper group today.

19 All right. We have an agenda that the special master
 20 has circulated and I think the parties have signed off on.
 21 Start off with the obligatory update on class certification.

22 MR. HOOVER: Good morning, Your Honor. Craig Hoover
 23 for defendants.

24 THE COURT: Good morning.

25 MR. WHATLEY: And Joe Whatley for the provider

1 plaintiffs.

2 THE COURT: Yes.

3 MR. HOOVER: So we've conferred, and I think we're in
4 agreement that the status is on track.

5 THE COURT: Okay.

6 MR. HOOVER: So just to give you a little detail, the
7 class expert depositions of plaintiffs was completed on time and -- by
8 May 15th. We're overlapping a little bit with the merits, so
9 the merits ones were completed on time last week. And in terms
10 of next steps, there will be *Daubert* motions on class experts by
11 July 1.

12 MR. WHATLEY: If there are any.

13 MR. HOOVER: If -- well, Joe is saying if any.

14 THE COURT: Yes. If any. We're holding our breath to
15 see how that turns out.

16 MR. HOOVER: Right. Exactly.

17 Hope springs eternal, Joe.

18 MR. WHATLEY: We're ready to respond just in case they
19 file, Your Honor.

20 MR. HOOVER: And then we would be filing our class cert
21 opposition and our expert reports, class expert reports, by mid-July.

22 THE COURT: Okay.

23 MR. WHATLEY: All agreed.

24 THE COURT: Would this be an appropriate juncture to
25 discuss document 2452, which was the joint report regarding

1 dispositive motions?

2 MR. WHATLEY: It is, Your Honor. I think one thing
3 we're in agreement on is that we would brief that and have it
4 addressed by the next status conference. Is that --

5 THE COURT: I'm not going to pretermitt that, but it
6 seems to me that the Blues' position all along is that there are
7 certain aspects of dispositive motions that will depend upon
8 what class certification looks like; right?

9 MR. HOOVER: Yeah. We briefed that last time, Your
10 Honor -- took briefing. The plaintiffs said everything should
11 be filed up-front. We said certain motions should be filed
12 up-front and certain later. You did bifurcate that in your
13 order.

14 THE COURT: Right.

15 MR. HOOVER: And it appears that plaintiffs are now
16 saying that they should all be filed up-front.

17 THE COURT: Yes. So I'm just wondering, is this a
18 request to back up and address --

19 MR. WHATLEY: No, Your Honor. It's not a request to
20 back up. They addressed two specific issues.

21 THE COURT: Lack of impact and market definition?

22 MR. WHATLEY: Lack of impact and market definition.
23 And it has to be taken into consideration in light of the record
24 that's been made. And we have filed expert reports that address
25 the market definition and address impact, both methodology and

1 applying that methodology. So our point is now in light of --
2 not asking you to go back, but in light of the record that has
3 developed, the market definitions that are there, the impact
4 that is demonstrated in the expert reports, both methodology and
5 applying that methodology, then it's ripe. That's our point,
6 Your Honor, and to consider it in light of the record that's
7 here and address it that way.

8 MR. HOOVER: Which, Your Honor, ignores all the
9 arguments that we made as to why, for certain motions, class
10 would need to have been decided. If we want to get into more
11 detail on that, I think Mr. Zott is prepared to address it. But
12 our position is this was all litigated. You decided that
13 certain class-dependent motions could be brought later. And
14 plaintiffs now are saying no, no motions should be brought
15 later, all of them should be filed up-front on September 15th.

16 MR. WHATLEY: No, Your Honor. We're --

17 THE COURT: Well, hold on. Let me hear from Mr. Boies,
18 because I think he was trying to get a word in edgewise.

19 MR. BOIES: Yes. Your Honor, I think our position is a
20 little different than that. The Court told the parties that
21 they should identify those motions that they believed were class
22 certification dependent. What we're asking is that those
23 motions be identified. And to say market definition and impact,
24 that's not identifying what motion you're going to make. And I
25 think that what we're saying --

1 THE COURT: You would like a little bit more flesh on
2 those bones?

3 MR. BOIES: We would, Your Honor, for two reasons.

4 THE COURT: Well, let me ask you this. What's the
5 benefit of that if we already have a schedule where these
6 motions will be filed and you'll have a full, fair, and adequate
7 opportunity to respond to the motions once they are filed?

8 MR. BOIES: Well, I think there are two issues, Your
9 Honor. One -- and this is -- this is entirely up to the Court,
10 just in terms of managing your docket. But we think that some
11 specificity in advance might be useful to allow the Court to
12 make a judgment as to whether these motions that they intend to
13 delay are actually class certification dependent or not. As I
14 say, I think that's something that's entirely up to the Court.
15 But we would suggest to the Court that a look at it before it's
16 a fait accompli might be useful.

17 The second point is something that is important to us,
18 and that is that we have motions for summary judgment as well.
19 And one of the things that we would like to get some
20 understanding on is what the guide rails are in terms of which
21 motions we bring now and which motions we bring later. From our
22 standpoint, we think there's very little that's really class
23 certification dependent. On the other hand, we think what's
24 important is whatever the rule is, it applies to both sides.
25 And so having some knowledge about that, some insight, some

1 clarification on that would be helpful to us before the filing.

2 THE COURT: And I appreciate that. I guess my reaction
3 to all this is at the time that I set the scheduling order
4 previously, I was -- at least, I thought I was cognizant of the
5 fact that what classes ultimately get certified by the Court
6 will necessarily have some effect on how these motions in
7 particular areas get set up, briefed, what evidentiary record we
8 have to consider, particularly when it comes to methodologies
9 demonstrating harm to a class rather than just a putative class.
10 It seems to me it doesn't matter what methodologies demonstrate
11 harm to a putative class because it's not a class yet. The
12 question is once the class is certified, we take a look through
13 that lens of how does this change, if at all.

14 And you're right. It may not be -- it may not --
15 depending on what class is certified, it may or may not change
16 significantly the motion practice; but we can't know that until
17 we actually see what's certified. I'm just taking a very
18 simplistic helicopter ride over the issues and saying, yes, I
19 can see where what class gets certified perhaps, particularly on
20 the provider side, may speak to questions like demonstrable
21 harm, the market definition that gets played out on a
22 rule-of-reason analysis, all sorts of things like that. Again,
23 maybe I'm just being overly simplistic, but I'm also trying to
24 keep an open mind as well.

25 MR. BOIES: Your Honor, I think that it's possible,

1 depending on what decision the Court makes on what class, that
2 there could be some -- there could be some impact with respect
3 to certain motions. And I think -- I think the Court recognized
4 that when it said to the defendants -- and I think maybe to the
5 plaintiffs as well -- identify those motions that you think are
6 class certification dependent.

7 THE COURT: So let me ask Mr. Hoover and Mr. Zott. One
8 thing that Mr. Boies just said that's appealing to me is there's
9 no harm with y'all continuing to dialogue and meet and confer
10 about what this is going to look like and keep those lines of
11 communication open and keep the Court abreast of those
12 discussions, as appropriate. Any problem with doing just that?

13 MR. ZOTT: Your Honor, David Zott. Good morning.

14 No. We have no problem dialoguing. Just to be clear,
15 we have dialogued, and we're happy to continue to dialogue. I
16 know we had hearings in front of Your Honor prior to the
17 scheduling order where we laid out in some detail what we
18 thought those motions would be. We also had a meet-and-confer
19 per the scheduling order that -- we also laid out what those
20 motions would likely be. And quite honestly, what Your Honor
21 has just said is very much exactly the way we're thinking about
22 it, that there are certain motions that are class dependent.
23 And there's two categories, the common impact and markets, both
24 of which will turn on, to some degree, what classes, if any, are
25 ultimately certified. And I stress "if any." So --

1 THE COURT: Is there a case out there in the
2 hinterlands somewhere that gives me a blueprint of what this
3 class certification process is going to look like?

4 MR. ZOTT: I'm sure there are.

5 Mr. Boies, would you like to take it?

6 THE COURT: I'm thinking it's going to be a -- there
7 aren't that many of them, if there are.

8 MR. ZOTT: No. It's --

9 MR. HOOVER: I think there have been other cases where
10 there were provider- and subscriber-side claims, but I don't
11 think there has been a case exactly like this one, Your Honor.

12 THE COURT: Where you've got per se and rule of reason
13 -- issues rolled in.

14 MR. HOOVER: Right.

15 THE COURT: You've got the number of markets that we're
16 dealing with here. And I know -- I realize we may be focusing
17 on particular markets. We've got different levels of
18 competition even called for by the ESA provisions. It just
19 seems like there's a lot of variables that I don't know how I
20 can possibly say the plaintiffs are right, that there are just
21 not going to be that many issues that crop up after class
22 certification that we can't identify before class certification.
23 That's just my, again, simplistic -- I keep using that word, but
24 I think it's apt -- my simplistic approach to this.

25 MR. ZOTT: There's a big efficiency issue. You know,

1 right now, the way the class briefing comes, there's numerous
2 potential markets, for example. And we don't know what markets
3 the Court is ultimately going to decide are susceptible to class
4 proof. It may be none. May be a narrow market; may be a broad
5 market. Why would we, you know, target a motion before we
6 even get guidance from the Court on your thoughts? And at that
7 point, we can be much more targeted and much more focused on
8 exactly what remains at issue in the case, if anything.

9 THE COURT: Okay. Well, I appreciate the report.
10 Anything else I need to know for now?

11 I'm not inclined to change the current scheduling
12 order, if anybody is asking me to do that. I am fine with
13 Mr. Boies's suggestion that maybe this report gets fleshed out a
14 little bit more and we start getting into the nitty-gritty of,
15 all right, which particular class issues could make a difference
16 and alert the Court to that at an appropriate time. I don't
17 know that I necessarily want to know what the -- I'm going to
18 try to be very process-driven in how we approach Rule 23 issues
19 in this case. It's not going to be what should it look like
20 after we get done. It's what does it look like in light of the
21 process as we work through the Rule 23 issues.

22 So I don't know that knowing all this in advance is
23 going to help me. I think it could substantially help you to
24 have a good game plan for tackling it, in the limited amount of
25 time I did provide in the scheduling order, how to get these

1 issues teed up and what work needs to be done as they're being
2 teed up after class certification rulings are made. Does that
3 make sense?

4 MR. HOOVER: Yes.

5 MR. WHATLEY: That's why we should meet and confer and
6 see if we can flesh it out some and report back to you next
7 time.

8 THE COURT: Sure. I think a continuing dialogue about
9 this would be very helpful, and I don't -- I'm certainly going
10 to encourage that. It sounds like I don't have to encourage it
11 much. It sounds like everybody is interested in trying to
12 realize efficiencies to scale once a class certification
13 decision is made on these various motions. And we'll see where
14 we are.

15 MR. HOOVER: Thank you, Your Honor.

16 MR. ZOTT: Thank you, Your Honor.

17 THE COURT: Okay.

18 All right. Well, Judge Putnam is now in retirement.

19 MS. JONES: Lucky guy.

20 THE COURT: He is beckoning me there, but I told him
21 it's not my time yet. So the question then becomes -- and Judge
22 Borden started with us. He's not -- I don't think he's
23 officially a -- he is on -- working on an interdistrict
24 assignment with us now. He's already magistrate judge in the
25 Middle. He's not fully Northern yet. I think that's still to

1 come, hopefully in a couple weeks. He asked me, am I picking up
2 any of this from Judge Putnam? And I told him no, not until,
3 you know, further notice. And I don't think you'll get any
4 further notice. I think the idea was that at least for now, the
5 Court, meaning me, would handle discovery matters going forward.
6 First, does everybody agree that was the game plan?

7 MR. RAGSDALE: Yes, sir.

8 THE COURT: So the question is -- two subissues under
9 discovery issues, then, in terms of what the big fruit is on the
10 vine still, when and how to update discovery -- that's been a
11 constant discussion point throughout the case -- and the Anthem
12 depositions. So take them in whatever order you two wish.

13 MR. RAGSDALE: I think they can actually be grouped
14 together. The parties are working on both of these issues,
15 continue to dialogue, meet and confer, discuss. There's been
16 good communication between us. We expect -- anticipate being
17 able to give you a scheduling order on these issues, to the
18 extent we can reach agreement, in July.

19 MR. HOGAN: The good news is there's nothing to decide,
20 Your Honor. Nothing is ripe. We need to meet and confer on
21 these issues.

22 On the Anthem deposition issue, I believe it's actually
23 resolved. There's a process in place.

24 With regard to the other issue, we have talked about it
25 numerous times. We have a strong view that is consistent with

1 what the Court said about updating before trial on structured
2 data, and we're just waiting to talk about any other issues. So
3 more to come next time, I think.

4 THE COURT: All right. It was interesting to me to
5 note, as we were getting ready for this, is one item not on the
6 agenda is anything about privilege or seal issues. I think that
7 speaks to how well our seal team and privilege team have done.
8 Mr. Hogewood is not here, so I'll brag on him. I think he and
9 the others on that group have done well. He's got a good reason
10 for not being there. Make sure you ask him about it. So I'm
11 very pleased with a lot of things about how the lawyers have
12 done in this case, but that's certainly one of them.

13 MR. HOGAN: Great.

14 THE COURT: All right. What else?

15 MR. RAGSDALE: I think that's all. We'll try to have
16 you some really spicy discovery motions later if you want.

17 THE COURT: You know, I would feel a little
18 shortened -- short-strawed if you didn't bring at least one of
19 those.

20 MR. RAGSDALE: I don't think that feeling will last
21 very long.

22 MR. HOGAN: I'm sorry. I hope to disappoint you, Your
23 Honor.

24 THE COURT: We'll see if I can't violate certain
25 Alabama statutes, then.

1 MR. RAGSDALE: Look forward to it.

2 THE COURT: If you didn't get that reference, ask Barry
3 about his remarks at Judge Putnam's retirement reception last
4 month.

5 MR. HOGAN: Thank you, Your Honor.

6 THE COURT: Okay. Thank you.

7 All right. Date and venue for the July 2019 status
8 conference. At the last status conference, I introduced this
9 idea that I think is somewhat lawyer-friendly to maybe look at
10 the three cities where the biggest component of lawyers in this
11 case reside -- and I think we said those are Chicago, New York,
12 and D.C. -- and maybe think about having status conferences not
13 consistently, but somewhat periodically, rotate there so we can
14 cut down on everyone's travel schedule and take turns doing
15 that.

16 For July, I've got a three- to five-week criminal trial
17 starting Monday that I think will be done by our next
18 conference, but there are no guarantees. And then I depart the
19 following week after that to Portland, Oregon, for a panel
20 hearing. So I'm not inclined to -- I'm inclined to have July in
21 Birmingham. Any problems with that if we defer the dream of you
22 getting to stay home at least one week every once in a while?

23 MS. JONES: Confirming that on the 22nd, Your Honor?

24 THE COURT: Yes. The 22nd is the day we're -- Ed?

25 MR. GENTLE: Yes, sir.

1 THE COURT: Still looking at the 22nd; right?

2 MS. JONES: No problem with us in Birmingham.

3 THE COURT: Okay. That's the update there.

4 What I think the best thing to do is -- I threw this
5 idea out. I don't have -- I'm not wedded to what we're going to
6 do about -- I wasn't even wedded to that we would do it. I
7 think this is very much something that would benefit counsel and
8 hold down costs from time to time. I'm going to let you
9 continue to meet and confer with the special master, and he can
10 interact with me about when we can do it and where. So maybe
11 we'll start looking at as early as August doing one of these,
12 but we'll come up -- it seems to me what we ought to do is come
13 up with a reasonable schedule. I don't want to -- I don't want
14 to lose sight of the fact that this case is assigned to this
15 district. So this is more of temporary relief than a seismic
16 shift in where we will do our business. Okay? That was the
17 idea.

18 Other issues?

19 No other issues. Okay. Do we want to sit -- is
20 anybody -- I don't usually do this, but I think probably I
21 should have done this. Anybody sitting behind the bar that has
22 another issue? Feel free to get with Ed if you don't want to
23 speak up now. I think it's been clear to everyone -- and if it
24 wasn't, it should have been -- that we use the counsel of 12 and
25 the steering committees and all that as facilitating

1 communication of the Court; but that's not -- if you have other
2 issues -- and I'm not suggesting you do, but if you do, Ed is
3 always available to touch base.

4 All right. What else do I need to take up for now?

5 All right. So I think what I'd like to do is meet in
6 this order, as far as our caucuses: subscribers, then Blues,
7 then providers. Okay?

8 And subscribers, we'll just start in the conference
9 room next door. Next door. No, next door. It's somewhere --
10 it's somewhere in that direction. You've been there before.
11 Okay?

12 MR. COOPER: Thank you, Your Honor.

13 THE COURT: Thank you. I appreciate -- I say this
14 every time. I try to remember to say it every time, anyway. I
15 appreciate all your hard work and your professionalism.

16 (Proceedings concluded at 10:02 a.m.)

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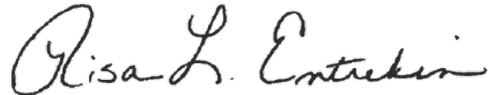
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1 COURT REPORTER'S CERTIFICATE

2 I certify that the foregoing is a correct transcript
3 from the record of proceedings in the above-entitled matter.

4 This 21st day of June, 2019.

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7 Risa L. Entrekin
8 Registered Diplomate Reporter
9 Certified Realtime Reporter
10 Official Court Reporter
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